

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 65 of 1998

Date of decision: 28-9-98

For Approval and Signature

The Hon'ble Mr. Justice S. K. KESHOTE

1. Whether Reporters of Local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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THAKORBHAI BHANABHAI RATHOD

Versus

INDRASINH GUMANSINH MAHIDA  
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Appearance:

MR DR DHIMAR for Petitioners  
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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 28/09/98

ORAL JUDGEMENT

Heard the learned counsel for the appellant.

This appeal is directed against the judgment and decree passed by the learned Third Joint Civil Judge (S.D.), Surat, Camp at Bardoli, in Special Civil Suit No.84 of 1995, decided on 17-3-1997, by which the suit of the plaintiff- appellant for permanent injunction has been dismissed. Translation of the plaint has been filed by the learned counsel for the appellant in this appeal. From the plaint I find that the plaintiff-appellant has prayed for the following relief:

- "(1) It may be declared that the Will dated 27-6-89 executed by the plaintiff's father Bhanabhai Dahyabhai regarding agriculture land Block No.90 situated at Tarsada Bar, Tal. Mandvi which is ancestral property of plaintiff's family is illegal and that it is not binding to plaintiffs and the said Will may be declared as null and void as it appears that the said false and got up will is got executed by taking advantage of plaintiff's father's ignorance.
- (2) Permanent injunction restraining the defendants from interfering with plaintiff's possession of the agriculture land bearing Block No.90 situated at Tarsada Tal. Mandvi may be granted. In the alternative if the plaintiffs' possession of the suit property is not believed, then in such circumstances, it may be declared that defendant's possession of the suit property is illegal and possession may be handed over to the plaintiff and till the possession is recovered the decree for mesne profit may be passed."

From reading of these prayers it no more remains in doubt that it is an admitted case of the appellant-plaintiff that his father Banabhai Dahyabhai had executed Will on 27th June, 1989. It is plaintiff's own case that this property is given to the defendant- respondent by Will. The finding of the trial court that the property which was subject matter of the Will is not ancestral property is not challenged by the learned counsel for the appellant in the course of his argument. It is really shocking that the Will has not been produced and the plaintiffs appellants sought declaration that it is illegal and inoperative. Learned counsel for the appellant contended that in the absence of the Will the trial court could not have decided the matter. But this

contention is not available to the learned counsel for the appellants for the reason that they themselves have gone to the trial court for declaration of the Will to be illegal and inoperative. So far as possession is concerned, the learned trial court has given finding that it is with the respondent-defendant. This finding of fact could not be successfully challenged by the learned counsel for the appellants-plaintiffs. He contended that possession of the respondent-defendant has not been admitted. But in the alternative it is prayed that in case the plaintiffs' possession of the suit property is not believed, it may be declared that the defendant's possession of the suit property is illegal and possession may be handed over to the plaintiffs. The second prayer made in the plaint clearly suggests the fact that the plaintiffs themselves have doubt about their own possession of the suit land. It is the case where the plaintiff has prayed for possession only, but also prayed for mesne profit. The way and the manner in which the prayer has been made, and now when the suit has been decided against the plaintiffs, it is difficult to appreciate the submission made on behalf of the appellants.

2. Lastly the learned counsel for the appellant contended that the trial court has held that the plaintiffs - appellants have right in the disputed property after death of their father. However, it is total misunderstanding of the judgment of the trial court. In what context this observation has been made by the trial court may be noticed. This observation is made in the context that the plaintiffs-appellants have failed to establish that the property in dispute is ancestral property, and further that it is an admitted case of the appellants-plaintiffs that the Will has been executed by their father. In case where the property would have been ancestral property and otherwise the Will would not have been executed by the father of the plaintiffs, certainly in that contingency, on death of their father, the plaintiffs-appellants would have got this property by succession, which is not the case here. I do not find any merit in this appeal.

3. In the result this appeal fails and the same is dismissed.

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